CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 427.

THE HIGHLAND AVENUE AND BELT RAILROAD COMPANY, APPELLANT,

vs.

COLUMBIAN EQUIPMENT COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 29, 1897.

(16,640.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1897.

1 United States Circuit Court of Appeals, Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable E. D. White, circuit justice; Honorable A. P. McCormick, circuit judge for the fifth judicial circuit, and Honorable William T. Newman, United States district judge for the northern district of Georgia.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Appellant,
v.
COLUMBIAN EQUIPMENT COMPANY, Appellee. } No. 595.

Appealed from the circuit court of the United States, northern district of Alabama, southern division.

2 This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Alabama, southern division.

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the question herein arising—

It is ordered that the following statement and question of law be certified to the honorable the Supreme Court of the United States:

On June 1, 1896, the Columbian Equipment Company, averring itself to be duly incorporated under the laws of the State of West Virginia and a citizen thereof, filed its bill of complaint against the Highland Avenue and Belt Railroad Company, a corporation organized and existing under the laws of the State of Alabama
3 and residing in the county of Jefferson, in said State, and a citizen thereof; which bill of complaint was as follows:

4 *Original Bill.*

In the United States Circuit Court for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant,
vs.
HIGHLAND AVENUE & BELT RAILROAD CO., Defendant.

The Columbian Equipment Company, which avers itself to be a corporation duly created and chartered under the laws of the State of West Virginia, and a citizen thereof, brings this, its bill of complaint against The Highland Avenue and Belt Railroad Company, a corporation organized and existing under the laws of the State of Alabama, and doing business and residing in the county of Jeffer-

son, of said State, and a citizen thereof in said county and within said district.

Humbly complaining, your orator, The Columbian Equipment Company, respectfully shows unto your honor:

1. That it is a corporation created and chartered under the laws of the State of West Virginia, and a citizen thereof, but has
5 its principal place of business in the city of New York, State of New York; that the defendant, The Highland Avenue and Belt Railroad Company, was created by an act of the General Assembly of Alabama, entitled, "An act to incorporate the Highland Avenue and Belt Railroad and Improvement Company," approved February, 1887, as will more fully appear by reference to the acts of the General Assembly of Alabama, 1886–1887, pages — to —, which said act your orator begs leave to refer to whenever it may so desire; that, in accordance with the powers conferred in section 1 of said act, the stockholders of the defendant, after its organization, adopted the corporate name of "Highland Avenue and Belt Railroad Company," and it has since continued to use such name.

2. That on and before the 31st day of December, 1894, the defendant was engaged in operating a belt railroad and dummy line in and through the city of Birmingham, Alabama, and in said county of Jefferson, and on said date entered into an agreement in writing with your orator for the sale of all of its properties, which said agreement is in words and figures as follows, to wit:

STATE OF ALABAMA, }
Jefferson County. }

An agreement entered into this, the 31st day of December, 1894, by and between the Highland Avenue and Belt Railroad Company, a corporation created and organized under the laws of Alabama, hereinafter termed the railroad company, party of the first part, and the Columbian Equipment Company, a corporation created and organized under the laws of West Virginia, hereinafter designated the equipment company, party of the second part:

Whereas, the parties of the first part have entered into a preliminary agreement in respect to the matters herein provided and contracted for, as appears by the records and proceedings of the said two corporations;

And, whereas, by a resolution of the board of directors of the railroad company, held on the 30th day of November, 1894, the terms of this contract were agreed upon, and Henry M. Caldwell was authorized on behalf of the railroad company to execute the same;

6 And whereas, the said parties hereto are each respectively expressly authorized by their respective charters to enter into this contract. Now, this agreement witnesseth:

1. The railroad company does hereby lease and let to the equipment company all of its railroad, with all of the rolling stock, engines, tools, machines, equipments, supplies and materials of all kinds now used or to be used in connection therewith and also all real estate,

personal property, franchises, rights of way and privileges for the period of eighteen (18) calendar months from the first day of December, 1894, at and for the rental of five (85) dollars per annum, and the proportionate part of said sum for any less time than one year; the said rental to be payable on the termination of said lease.

2. The railroad company covenants and agrees that it will procure at its own cost and expense, for the benefit of said equipment company, within two (2) months from the first day of December, 1894, the right of way necessary for a railroad track to connect the line of the Birmingham and Gate City street railroad with the track of the Highland Avenue and Belt railroad, at or near the gin factory on Tenth avenue.

3. Said railroad company further agrees that said equipment company shall have the right and option at any time during the continuance of said lease, to purchase all the said railroad, real estate, property, franchises, privileges and rights of way of said railroad company for the sum of three hundred and fifty thousand ($350,000.00) dollars, upon the following conditions and terms: For said option and privilege the said equipment company shall pay to the said railroad company the sum of thirty-five thousand ($35,000.00) dollars, as follows: Twenty thousand ($20,000.00) dollars on or before the first day of January, 1895, at which time the railroad company will deliver the possession of all of said railroad, real estate, property, franchises, privileges and rights of way to said equipment company, and fifteen thousand ($15,000.00) dollars on or before the fifteenth day of February, 1895; in the event of a failure to pay said fifteen thousand ($15,000.00) dollars by the fifteenth day of February, 1895, said privilege and option shall on that day cease and determine, and the twenty thousand ($20,000.00) dollars previously paid shall be thereby forfeited and the possession of the property shall be forthwith restored to the railroad company. In case the said equipment company shall exercise its right and option to make said purchase within the time above specified, to wit, during the continuance of this lease, said sum of thirty-five thousand ($35,000.00) dollars so paid as aforesaid, shall be considered and treated as a part of the purchase price, and the residue, to wit: three hundred and fifteen thousand dollars ($315,000.00) *dollars*, shall be paid with interest at the rate of five (5) per centum per annum, from the first day of January, 1895, to the time of payment.

7

4. The said railroad company hereby agrees to have prepared and duly executed to said equipment company within thirty (30) days after the payment of said sum of fifteen thousand ($15,000.00) dollars as hereinabove provided, good and sufficient deed or deeds of conveyance and transfer of all of said railroad, real estate, property, franchises and right of way and to deposit said deed of deeds and transfers with the Central Trust Company of the City of New York in escrow to be delivered to said equipment company whenever within the period of said option, to wit, on or before the first day of June, 1896, said sum of three hundred and fifteen thousand ($315,000.00) dollars with the interest thereon at five (5) per centum per annum from the first day of January, 1895, shall have been de-

posited in said Central Trust Company to the credit and subject to the check of the railroad company, less any amounts which the equipment company may, in the meantime, have seen fit to pay or to advance to said railroad company. Said railroad company further covenants and agrees that it will make said conveyance and transfer of said railroad, real estate, property, franchises and right of way, free and unencumbered of all liability, and will pay off and discharge all liens, taxes or judgments which now exist or which may hereafter be obtained upon the liabilities of the railroad existing on the first day of December, 1894.

5. Said railroad company agrees that it will apply a portion of said thirty-five thousand ($35,000.00) dollars to the satisfaction
8 in part, of the judgments now existing as a lien on said property. It further agrees that it will protect the said equipment company in the operation of said property from the judgments already recovered against it or which may hereafter be recovered on liabilities existing as aforesaid, so that the same shall not interfere with the operation of said property by the said equipment company.

6. In the event the said equipment company fails within the period of said option and privilege, to wit, on or before the first day of June, 1896, to pay said sum of three hundred and fifteen thousand ($315,000.00) dollars, with interest, as aforesaid, less such sum to which it may be entitled as credits thereon, if any, said option and privilege to purchase shall thereupon and thereby, and without further notice, absolutely cease and determine, and the said equipment company will restore to said railroad company the possession of the said railroad, real estate, property, franchises and right of way, free and discharged of any lien, interest, claim or demand done or suffered by said equipment company, except the taxes for the year 1895; and the said Central Trust Company shall in that event return to the said railroad company the deeds, conveyances, transfers and agreements which may be deposited in escrow with it without the payment of any commission or other charge whatsoever upon the same.

7. Said equipment company covenants and agrees on its part that it will pay said sum of thirty-five thousand ($35,000.00) dollars as herein provided. That during the term of said lease, and within six (6) months from the first day of January, 1895, it will make or cause to be made improvements and betterments on the property and equipments of said railroad company, at an expenditure of not less than ten thousand ($10,000.00) dollars. The said equipment company also agrees that it will pay the taxes on said property for the current year, and the amount so paid for taxes, with interest at five (5) per centum per annum, shall be regarded and treated as a credit on said sum of three hundred and fifteen thousand ($315,000.00) dollars, to be paid in the event it shall exercise the option herein provided; and the said equipment company further agrees that it will advance and pay such additional sum as may be neces-
9 sary to pay said judgments recovered and to be recovered as aforesaid, in the event the said railroad company cannot postpone the payment of the same until after the time when the

said equipment company shall exercise its said option; said agreement being subject to the agreement on the part of the railroad company to protect the said equipment company against interference in the operation of said property by said judgments.

In witness whereof the Highland Avenue and Belt Railroad Company authorizes this contract to be executed by Henry M. Caldwell, one of its directors, and its corporate seal to be hereto attached this, the day and date first above written.

Executed in duplicate.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY,
Per H. M. CALDWELL,
[SEAL.] *Director, with Full Power to Act.*

The Columbian Equipment Company hereby accepts the foregoing lease and contract, and in witness thereof has caused the same to be executed by its president and secretary, and its corporate seal to be hereto affixed, in duplicate, the day and date as aforesaid.

THE COLUMBIAN EQUIPMENT COMPANY.
WAYLAND TRASK, *President.*
[SEAL.] CLARENCE E. STUMP, *Secretary.*

3. That shortly after the first day of December, 1894, your orator took possession of said Belt railroad, dummy line and other properties of the defendant, holding and operating them continuously to the present time.

That in pursuance of the terms of the foregoing agreement your orator has paid the sum of $35,000.00 in cash to the defendant, and in addition thereto has expended on improvements and betterments on the properties and equipment belonging to the defendant to the extent of, to wit: $27,108.56, said expenditures being apportioned as follows:

Rolling stock	$15,947	09
Lakeview park	2,341	15
10 Twenty-second Street bridge	1,070	67
Roadway	6,915	26
Buildings, fences	699	74
Office fixtures	134	65

as shown by orator's books and accounts in Birmingham, Alabama, in excess of the moneys received by your orator from the operation of defendant's property during the term of the foregoing agreement.

Orator avers that the defendant not until the first week in May, 1896, deposited with the Central Trust Company of the City of New York, an instrument in writing in escrow, purporting to be a deed of conveyance and transfer of the railroads, real estate, property, franchises and rights of way of the defendant to your orator, a copy of which said instrument in writing is hereto attached marked "Exhibit A," and prayed to be considered as a part of this bill of complaint.

4. That prior to the execution of said agreement in writing of date December 31st, 1894, Wayland Trask, the president of your orator, came to Birmingham, Ala., from New York, and was by the defendant shown its properties, railroads and rights of way, and your orator avers that the defendant at that time represented to it that the title to its properties was free and clear of all encumbrances, except as to judgments then of record, a list of which judgments is hereto attached marked "Exhibit B" and prayed to be considered as a part of this bill of complaint.

Your orator avers that prior to said agreement of date December 31st, 1894, the defendant represented to it that it was the owner in fee-simple of the strips of land on which its Belt railroad and dummy line were located in and through the said city of Birmingham, Alabama; that it acquired the same from the Elyton Land Company, a body corporate under the laws of the State of Alabama, which had reserved such strips of land for railroad purposes for its own use, when it mapped and platted the property which covered the site of the present city of Birmingham, Alabama, and suburbs; that at said time, the defendant represented to them that the dedication of the streets and avenues of the said city of Birmingham, Alabama, by the said Elyton Land Company, upon which its said rail-
11 roads were located, was made subject to the reservation of said strips of land in the centre thereof for railroad purposes, as aforesaid, and that on account of such reservations, its said Belt railroad was peculiarly valuable as a terminal road for any railroad that might enter the city of Birmingham.

5. That some time prior to the year 1884, the Elyton Land Company, a corporation created and organized under the laws of the State of Alabama, was the owner of a large tract of land which covered the site of the present city of Birmingham and suburbs; that prior to the year 1884 the said land company laid out that part of its lands which lies in section 6, township 18, range 2 west; section 31, township 17, range 2 west; section 36, township 17, range 3 west, and section 1, township 18, range 3 west, of the Huntsville meridian, as is shown on the map hereto attached marked "Exhibit C," and prayed to be considered as a part of this bill of complaint.

6. Your orator avers that a portion of said Belt railroad and dummy line was constructed in and through the city of Birmingham by consent of the municipal authorities thereof, to wit: From Nineteenth street, along First avenue to Twenty-second street, thence along Twenty-second street to Fifth avenue south, from Twenty-seventh street along Fifth avenue southwestward to Thirteenth street, along Fifteenth street from Fifth avenue south to Eighth avenue south, from Fifth avenue south along Fourteenth street to and across Avenue A, and upon and along Avenue B from Fourteenth street westward to the then city limits, which said city limits, at the time of the construction of said part of railroad, is shown by the square of red line on said map marked "Exhibit C." The locations of said parts of railroads constructed within said city limits are likewise shown on said map.

Orator avers that the defendant has no title in fee to said portions

of tracks so constructed within said city limits along, over and upon said streets and avenues, but has only an easement for the operation of its railroad, which is under the control and jurisdiction of the municipal authorities of the said city of Birmingham.

7. Orator avers that prior to the execution of said agreement between your orator and the defendant, it represented to
12 your orator that it was the owner in fee of a railroad track and right of way from a point opposite the east line of Boland's property in block 435, according to said map of Birmingham, westward along the tracks of the South and North Alabama railroad to a point between Twenty-fourth and Twenty-fifth streets, and to a connection with a strip of land called the "neutral strip," which said neutral strip the defendant represented to your orator was a strip of land dedicated by the Elyton Land Company to railroads entering the city of Birmingham: that over and on said neutral strip the defendant had a right of way passing through the city of Birmingham from Twenty-fourth to Fourteenth streets therein, and into and through the Union depot in said city.

Orator avers and charges that the defendant has its track laid along the edge of the right of way of the South and North Alabama railroad between said points, which orator is informed was placed there by a permit or license of the South and North Alabama railroad, but orator avers and states it to be a fact, that said South and North Alabama railroad is now contesting the right of the defendant to said track, denying that it has any title thereto; that the track between said points is now in litigation under and by virtue of a bill filed in the chancery court of Jefferson county, wherein The Highland Avenue and Belt Railroad Company is complainant and The South and North Alabama Railroad is defendant, which said suit is presently pending in the supreme court of Alabama. The said disputed right of way is marked by a red line between the points "U" and "T" on a map hereto attached, marked "Exhibit D," and prayed to be considered as a part of this bill of complaint.

Your orator further avers that the deed deposited by the defendant with the said Central Trust Company in escrow makes no conveyance specifically of said track or right of way, and orator avers that the same is a material and indispensable portion of defendant's property.

Orator further avers that said instrument in writing so deposited with said Central Trust Company in escrow attempts to convey a right of way to your orator over said "neutral strip" in words as follows:

13 "Also such right as the Elyton Land Company may have conveyed to the said railroad company to a strip of land twenty-two feet wide off the north side of the common right o way north of the Alabama Great Southern Railroad right of way extending from the right of way of the South and North Alabama railroad near Twenty-fifth street westward to the east side of Eighteenth street.

"Also such right as the Elyton Land Company may have con-

veyed to said railroad company to a strip of land thirty-five feet wide off the north side of the common right of way north of the Alabama Great Southern Railroad right of way, extending from the east side of Eighteenth street to the east side of Fourteenth street."

Orator avers that according to said agreement it is entitled to a good and sufficient deed to the last-named rights of way, and your orator affirms and states it to be a fact that the Elyton Land Company has lost its right to the same, as will more fully appear by a decision of the supreme court of Alabama in a suit wherein the said land company sought to eject the South and North Alabama railroad from said "neutral strip," reported in volume 95 of Alabama Reports, page 631. Orator avers that the South and North Alabama railroad is the owner of the said strips of land on said "neutral strip," which the defendant seeks to convey to your orator. Your orator therefore states that the defendant's title thereto is absolutely worthless and in point of fact does not exist. Orator avers that the loss of said last-named strips of land defeats in a large measure the purposes and objects of orator's agreement with defendant, and that the same are a material and indispensable portion of defendant's property. The location of said strips of land, with reference to the Union depot, in said city, is marked in parallel dark lines on the map attached hereto as "Exhibit D."

8. Orator avers, as will more fully appear by reference to "Exhibit A," that the defendant in the said instrument in writing so deposited with said Central Trust Company, seeks to convey in fee-simple to your orator the following-described property, known as "Lakeview park:"

"Beginning at the point of intersection of the east side of
14 Clairemont avenue, with the northeast line of Highland avenue, thence northward along said Clairemont avenue 119.74 feet; thence ninety degrees to the right 742.2 feet; thence sixty-nine degrees and forty-five minutes to the right 438.45 feet; thence fifty-five degrees fifty-seven minutes to the left 399.95 feet; thence nine degrees thirty-four minutes to the left 997.1 feet; thence ninety degrees to th- right 587.5 feet; thence seventy-one degrees forty-seven minutes to the right 420.5 feet; thence eighteen degrees thirteen minutes to the right 538.57 feet; thence nineteen degrees thirty-nine minutes to the left 574.85 feet; thence eight degrees thirty-one minutes to the left 631.61 feet to said Highland avenue; thence in a northerly direction along said Highland avenue to the point of beginning."

Which said property orator avers is described according to the map and plan of the Elyton Land Company of the City of Birmingham, as will more fully appear by reference to said "Exhibit D."

Your orator is advised that the defendant has no legal right to dispose of said property in fee-simple, for that long before the organization of the Highland Avenue and Belt Railroad Company, the said Elyton Land Company had irrevocably dedicated said Lakeview park to the public use; that said land company some time during the year 1884, or shortly thereafter, surveyed, mapped and platted its property contiguous to and east of the then city of Birmingham,

Alabama, and divided the same into lots, blocks, alleys, streets and avenues, and marked and designated on said map the property which the defendant seeks to convey in fee-simple to your orator as "Lakeview park," and since said time said land company has continuously sold lots with reference to said map and abutting on said streets and avenues. Orator is informed, and on such information states that said park contains about seventy acres of land, and that it is reasonably worth one thousand dollars per acre. Your orator avers that before it entered into said agreement with defendant, it represented to your orator that it was the owner in fee-simple of said park, and your orator avers that according to said agreement the defendant is required to convey said property, known as
15 "Lakeview park," to your orator by a good, merchantable and vendable title; and your orator is advised by counsel, believes, and, therefore, states that the defendant has no such merchantable and vendible title to convey to your orator.

9. Orator further shows unto your honor that in said instrument in writing so deposited with said Central Trust Company, the defendant purports to convey to your orator the following strips of land:

"Also a strip twenty-two feet wide off the north side of the common right of way north of the Alabama Great Southern railroad, extending from the eastern boundary of the Elyton Land Company's property to the east side of Thirty-second street.

"Also a strip of land eleven feet wide, located in the common right of way between the eleven-foot right of way of the Mary Pratt Furnace Company and the thirteen-foot right of way of the Georgia Pacific railway, extending from the east side of Thirty-second street westward to the South and North Alabama Railroad right of way near Twenty-sixth street.

"Also a strip of land twenty-two feet in width off the north side of the common right of way north of the Alabama Great Southern Railroad right of way, extending from the east side of Fourteenth street to the line between the east half and the west half of section 2, township 18 south, range 3 west, subject to a twenty-six-foot right of way of the Georgia Pacific railway crossing said strip, and except that portion of said strip lying within the west half of the southeast quarter of section 35, township 17, range 3."

Your orator further avers that when it entered into said agreement with defendant it represented unto your orator that it was the owner of a right of way from the west side of Twenty-fourth street eastward to a point where the South and North Alabama railroad diverges toward the north from the right of way of the Alabama Great Southern railroad. But orator avers that in said instrument in writing deposited with said trust company, the defendant has made no effort to convey to orator such a right of way.

Orator further avers that the South and North Alabama
16 railroad has located its tracks on the right of way mentioned in this paragraph of the bill, extending from the east side of Fourteenth street to the line between the east half and west half of section 2, township 18, range 3 west, as aforesaid, as will more fully

appear by red lines on and near Fourteenth street on said map attached hereto and marked "Exhibit D."

Orator avers that the said South and North Alabama railroad has been operating over a portion of defendant's right of way as indicated for many years.

Orator further avers that in the years 1880–1881 the said South and North Alabama railroad constructed on the extension of said 35-foot "neutral strip" from the west side of Twenty-fourth street to the point where its road diverges towards the north from the Alabama Great Southern railroad, several tracks, and orator avers that such tracks are located on the said right of way which the defendant represented to your orator as aforesaid that it owned and which right of way the defendant has as aforesaid failed to convey to your orator in said instrument in writing deposited with said trust company.

Orator further avers that in the year 1880 or 1881 the said South and North Alabama railroad placed on an extension of said 35-foot strip, from Twenty-fifth street according to said map (Exhibit D) along and parallel with and adjoining the right of way of the Alabama Great Southern railroad eastwardly to the eastern line of section 30, township 14, range 3 west, several railroad tracks; and orator is informed and on such information states that there is a track located on the said 22-foot right of way of the defendant off the north side of the common right of way north of the Alabama Great Southern railroad, extending from the east side of Thirty-second street eastward to the east line of section 30; and orator is informed and on such information states that there is a railroad track located on the said 11-foot right of way of the Mary Pratt Furnace Company and the 13-foot right of way of the Georgia Pacific railway, extending from the east side of Thirty-second street westward to the South and North Alabama Railroad right of way near Twenty-sixth street. Orator is not informed whether
17 the tracks that are so located on defendant's right of way are the identical tracks of the said South and North Alabama railroad constructed in 1880–1881 as aforesaid. But your orator avers and states it to be a fact that there is now pending in the chancery court of Jefferson county, Alabama, a suit filed by a bill in chancery on the 31st day of December, 1891, wherein The South and North Alabama Railroad Company is complainant and The Elyton Land Company and The Highland Avenue and Belt Railroad Company are defendants, and wherein the said South and North Alabama Railroad Company is contesting with the said Highland Avenue and Belt Railroad Company the right of said portions of track between Twenty-fourth and Twenty-fifth streets as aforesaid and in and near said Fourteenth street as aforesaid; and orator avers that said suit is still pending; and orator avers that the location of defendant's said right of way west of said Fourteenth street is shown on said map hereto attached marked Exhibit D by dark parallel lines and opposite the words "Linn iron works;" and orator avers that said right of way has become isolated and rendered practically valueless by reason of the location of the said

South and North Alabama Railroad tracks thereon and by reason of the loss of the aforementioned right of way over said "neutral strip" extending from the east side of Fourteenth street eastward to the right of way of the South and North Alabama railroad near Twenty-fifth street.

And orator further avers that the said Elyton Land Company, prior to 1880, and before the organization of the defendant, extended from said neutral strip between said Fourteenth and Twenty-fifth streets as aforesaid, a 35-foot strip from the east side of Fourteenth street in a westerly direction to the western boundary of the east half of the southeast quarter of section 35, township 17, range 3 west, along and parallel with the said right of way of the Alabama Great Southern railroad, as and for a common right of way for all railroad companies doing business in and through the city of Birmingham. And orator further avers that about the same said time the Elyton Land Company also extended from said neutral strip near Twenty-fourth street as aforesaid a 35-foot strip from the west side of
18 Twenty-fourth street in an eastwardly direction to the east line of section 30, township 14 south, range 3 west, along and parallel with said right of way of the Alabama Great Southern railroad as and for a common right of way for all railroad companies doing business in and through said city; that when the said strips were extended as aforesaid, the Elyton Land Company set apart, designated and dedicated the said strips so extended for use as such common rights of way and thereafter the said land company sold and conveyed its lands and lots lying adjoining to and north of said 35-foot strip so extended and by the conveyances of and agreements to convey said lands and lots, the said land company bounded the same so sold on the south by said 35-foot strip and designated and dedicated the same as such common right of way, all of which will more fully appear from the conveyances made by said land company to Charles Linn and the Pratt Coal and Coke Company and from the bill of complaint exhibited by the Elyton Land Company against Robert Roberts, Maud Evans *et al.* on the 14th day of April, 1887, in the city court of Birmingham, true, correct and certified copies of such deeds and bill of complaint are hereto attached marked respectively "E," "F," "G" and "H," which likewise are prayed to be considered a part of this bill of complaint.

Your orator further avers that in said suit pending in said chancery court between the South and North Alabama railroad and the said Elyton Land Company and this defendant, the said South and North Alabama railroad claims the said 35-foot strips of land extended as aforesaid to have been dedicated to the public as a common right of way for all railroads entering the said city of Birmingham; and your orator avers that the rights of way which the defendant seeks to grant to your orator mentioned in this paragraph of the bill and the said right of way which should have been conveyed in said deed with said trust company, between Twenty-fourth and Twenty-fifth streets, are located upon said 35-foot strips of land extended as aforesaid; and your orator is advised by counsel, believes and therefore states, that the defendant's title

thereto is not merchantable and vendible and not the char-
19 acter of title which is called for by the said agreement of date the 31st day of December, 1894.

10. Orator avers that prior to said agreement of December 31, 1894, the defendant represented to your orator that it was the owner of a railroad track and right of way from

"Twenty-third street and Fifth avenue, south, southward along Twenty-third street to Magnolia avenue; thence along Magnolia avenue to Twenty-first street; thence along Twenty-first street to Highland avenue, said right of way being commonly called 'the loop.'"

Orator avers that said "loop" is a material and valuable portion of said property and that in said deed so deposited in escrow with said trust company no conveyance of this portion of defendant's property specifically appears. Orator avers that defendant constructed this part of its said railroad, but that it derived no title thereto from the said Elyton Land Company, and orator is informed and on such information states that it has no franchise therefor from the city of Birmingham.

11. Orator further represents and shows unto your honor that in said instrument in writing deposited in escrow as aforesaid, the defendant purports to convey a 26-foot strip of land on which is located its dummy line along the following streets and avenues of said city:

"From the intersection of Fifteenth street and Eighth avenue, south, along said Fifteenth street, south, to Tenth avenue, south; thence along Tenth avenue to Cottonwood avenue; thence through Cottonwood avenue to Eleventh avenue, south; thence through Eleventh avenue to Twentieth street and Highland avenue; thence along Highland avenue to Twenty-ninth street; thence along Twenty-ninth street to Seventh avenue, south; thence along Seventh avenue to Twenty-seventh street; thence along Twenty-seventh street to Fifth avenue, south."

Your orator avers that the railroad located on the right of way mentioned in this paragraph of this bill was built and constructed by the said Elyton Land Company and at the time of its construction and location on said last-named streets and avenues said
20 streets and avenues had been by said land company dedicated to the public use as public thoroughfares. Orator avers on information that said land company constructed said last-named railroad after it had opened said streets and avenues, after it had mapped and platted its lands, showing said streets and avenues to be public thoroughfares, after it had published its maps showing said streets and avenues to be such public thoroughfares; and orator avers that said railroad was constructed after said land company had sold portions of its lots and lands so mapped and platted and abutting upon said streets and avenues, and after it had dedicated said streets and avenues to public use, upon which it afterwards located and built its said railroad; and orator avers that every part and parcel thereof, including said strip of land of twenty-six feet, is now under the jurisdiction and control of the municipal

authorities of the city of Birmingham, Ala.; and your orator avers that in a certain suit, wherein your orator, as lessee, and The Highland Avenue and Belt Railroad Company are complainants, and The Birmingham Railway and Electric Company is defendant, instituted in the chancery court of Jefferson county, and now pending in the supreme court of Alabama, the said Birmingham Railway and Electric Company is contesting with the defendant in this suit its right to said 26-foot strip of land as a reservation, denying that the defendant herein has any exclusive right to the use of said last-named streets and avenues; and your orator further avers that about one half mile of said reservation of twenty-six feet, located in the northwest quarter of the northeast quarter of section 6, township 18, range 2 west, is subject to the dower right of one Rebecca E. Denny, as will more fully appear by reference to a decision of the supreme court of Alabama in the case of Rebecca E. Denny *vs.* The Elyton Land Company, reported in 96 Alabama, page 336.

12. Your orator further represents and shows unto your honor that in said instrument in writing deposited in escrow as aforesaid, defendant purports to convey a 26-foot strip of land located in the following streets, avenues and blocks in the said city of Birmingham:

"Fifth avenue, south, from Twenty-seventh street to Thirty-second street, along Thirty-second street southward to Highland avenue, along Thirty-second street northward to Tenth avenue, north; Tenth avenue, north, from Thirty-second street to near Fifteenth street; Eighth avenue, north, from Thirteenth street to the boundary line of the Elyton Land Company's property near Ninth street; Fifth avenue, south, from Thirteenth street to the South and North Alabama Railroad's right of way; Seventh street from Sixth avenue, south, southward to the line of the Elyton Land Company's property; First avenue, south, from Thirty-second street eastward to the line between sections 29 and 30, township 17 south, range 2 west."

Orator avers that the Belt railroad of defendant which is located on the rights of way mentioned in this paragraph of this bill of complaint was constructed on said last-named streets and avenues after the said Elyton Land Company had opened said streets and avenues; after it had mapped and platted its lands showing said streets and avenues to be public thoroughfares; after it had published its maps showing said streets and avenues to be public thoroughfares; after said land company had sold lots so mapped and platted and abutting upon said streets and avenues, and after it had dedicated said streets and avenues to public use, upon which was afterwards located and built said portions of said Belt railroad, and orator avers that every portion of the main line of said Belt railroad is now under the jurisdiction and control of the municipal authorities of the city of Birmingham, Ala.; orator avers that the defendant has no franchise from said city for the last-mentioned rights of way; and orator further avers that in and by the said act of the General Assembly of Alabama, incorporating the Highland

Avenue and Belt Railroad Company, it is enacted and provided that:

"Nothing in said act shall be so construed as to impair or abridge the power and authority of the corporate authorities of the city of Birmingham over the streets, avenues, alleys and public grounds thereof."

Orator is advised by counsel, believes and therefore states that the defendant has no exclusive right to the last-mentioned strips of land, but that the defendant has an easement thereon for the
22 operation of its railroad, and that under the constitution and laws of the State of Alabama other railroads have the right to use the same upon the payment of a reasonable compensation therefor.

Your orator avers that before it entered into said agreement with the defendant, it represented to your orator that it had the exclusive rights to said strips of land mentioned in this paragraph and that on account of such exclusive right its said Belt railroad was peculiarly valuable as a terminal road. Your orator avers that unless the title to this portion of the defendant's rights of way is held by it in fee, it will materially lessen the value of such Belt railroad as a terminal one and defeat in a large measure the purposes and objects inducing your orator to enter into said agreement of December 31, 1894.

13. Your orator avers and shows unto your honor that the defendant in point of fact does own in fee-simple certain rights of way through the following-named blocks according to said map of the city of Birmingham, to wit: Blocks 129, 12, 585, 586, 599, 600, 601, 460, 481, subdivision "E" of block 112, the northwest corner of lot 4, fronting 30 feet on the south side of Tenth avenue, north, and running back 75 feet on the east side of Thirty-second street. Orator avers that said blocks were deeded to the Highland Avenue and Belt Railroad Company by the Elyton Land Company September 14, 1887, and were by said Highland Avenue and Belt Railroad Company on the 30th day of July, 1890, deeded back to said land company by said railroad company; but orator avers that in said last-named deed the defendant specifically, by metes and bounds, reserved a right of way through said blocks for its said railroad, as will more fully appear by a copy of said last-named deed, which is hereto attached marked "Exhibit I" and prayed to be considered as a part of this bill of complaint.

Your orator avers that the defendant in said instrument in writing deposited in escrow as aforesaid, has not specifically conveyed the rights of way mentioned in this paragraph of the bill. Your orator avers that without such rights of way it would be impossible to operate the Belt railroad of the defendant with trains of freight cars, and that without such rights of way said Belt
23 railroad as conveyed would be only parts and parcels of a road: and orator avers that in said deed deposited in escrow as aforesaid, the defendant fails to convey a right of way 13 feet on either side of the center line of Avenue A, or First avenue, south, beginning in the west line of Twenty-ninth street and extending

eastward along the center of said Avenue A, or First avenue, south, of uniform width of 26 feet to the right of way of the Highland Avenue and Belt railroad in the center of Thirty-second street; also a right of way 13 feet wide for single railroad track along Walker street, extending from Eighth avenue (or Smithers' boulevard), south, as far as Martha avenue; also right of way 26 feet wide for double tracks along Walker street from Martha avenue, south, to Sallie avenue, in the town of Smithfield, adjacent to the city of Birmingham, Ala.; also right of way for railroad 26 feet wide over north end of west half of northwest quarter of section 19, township 17, range 2 west, from east to west, in said Jefferson county, specifically, which your orator affirms and states the defendant claims to have title to; and your orator avers that in said deed so deposited in escrow, the defendant seeks to convey to your orator lots 1, 2, 3, 4, 5, 6, 7, 8, in block 178, but orator avers that said lots should be in block 179, according to the map and plan of the city of Birmingham, Ala., for that it is on block 179 that the shops of said defendant are partly located.

14. Orator avers that the following tracks of the defendant are built over lands for which it has no deeds for rights of way:

A. Through the north half of block 599.

B. In Thirty-third street from Eleventh to Tenth avenues, north, to the gin factory.

C. Through the northwest corner of block 14, and on Thirteenth street *Thirteenth street* to a connection with the Kansas City, Memphis and Birmingham railroad near Seventh avenue.

D. In Avenue E from Thirty-second to Thirty-third streets, and through block 478 to the property of the Birmingham Railway Supply Company.

E. All that portion of the north half of block 340 near Avenue E and Eighth street.

24 F. Along the south line of Powell avenue, from Fifteenth to Eighteenth streets.

G. Through the southeast corner of block 755 near 21st street and Highland avenue.

H. Through block 483 connecting defendant's Belt railroad on Thirty-second street and its right of way to the Mary Pratt furnace.

I. Into the property of the Sloss Iron and Steel Company known as "City Furnaces," in Birmingham, according to said map and plan of the city of Birmingham.

Orator avers that in order to successfully operate said railroad it is necessary to own the rights of way mentioned in this paragraph; and orator avers that the right of way through block 483 is absolutely necessary to reach the Mary Pratt furnace, near the city of Birmingham.

Orator avers that before executing said agreement of December 31, 1894, the foregoing tracks were shown to the president of your orator by defendant, which represented that it was the owner thereof.

15. Orator avers that according to said agreement of date Decem-

ber 31, 1894, the defendant should procure the right of way for a railroad track to connect its Belt railroad with the Birmingham and Gate City street railroad at or near the gin factory on Tenth avenue, north; and orator avers that the defendant has not complied with the provision of said agreement.

16. Orator further shows that in said deed so deposited with said trust company, defendant seeks to convey to your orator such right as the Elyton Land Company may have conveyed to it to a strip of land 26 feet wide along the east side of the canal in the northeast quarter of the northwest quarter of section 8, township 17, range 2 west, in said county. Orator avers that it does not know the character of the said title that the defendant offers thereto, but states that under its agreement with defendant it is entitled -o a good and sufficient deed and not such right as said land company may have conveyed.

17. Orator states unto your honor that it has made no demand upon the defendant for the amount of money so expended by your orator as aforesaid and that the same was unnecessary in that the defendant is without funds to meet said demand or any considerable part thereof, and has no assets which are readily convertible into money and has no reasonable prospect of being able to meet said demand if made. And orator avers that the assets of said defendant consists of said Belt railroad, dummy line, equipment, park, etc., and orator avers, as will more fully appear by reference to Exhibit B that there are judgments of record against the defendant amounting to — which are prior to your orator's demand.

18. Your orator further avers that about the time it entered into said agreement with defendant it also entered into an agreement for the purchase of the Birmingham and Gate City street railroad from the Mercantile Trust and Deposit Company of Baltimore, Md.; that your orator went into possession of said Birmingham and Gate City street railroad and is presen-ly holding and operating the same. Orator further states that for the past year it has operated the property it received from the defendant in connection with said Birmingham and Gate City street railroad, using the rolling stock and equipment of the two said railroads interchangeably; that is to say, the Highland Avenue and Belt railroad has a portion of the rolling stock of the Birmingham and Gate City street railroad and a portion of the rails of said road also, and your orator states that there is laid about one mile of the track of the Birmingham and Gate City street railroad with rails that belong to the defendant. Orator avers that at the time said rails from the Belt railroad were placed upon the Birmingham and Gate City street railroad it was its intention to purchase both railroads, and that the use of the Belt railroad's rails was necessary in order to carry the rolling stock of the Belt railroad upon the line of the said Gate City road, and that such use was made without any protest on the part of the defendant; and your orator hereby offers to restore said rails or the value thereof if this court should direct whenever it may be determined the amount of such value. And your orator further represents and

shows unto your honor that it is ready and willing to do
26 and perform all acts and things required in law to be done or performed according to the terms and directions of your honor's court.

19. Your orator further avers that according to the principles and practice of courts of equity, it is entitled upon the facts and premises hereinbefore shown to elect, and it accordingly does elect, to bring this cause hereinbefore set forth into this court and to claim and receive therefrom the relief to which, upon which this bill and the facts to be proven thereunder, it is entitled to have decreed it herein, and which court alone can afford adequate relief to your orator in this cause. That the subject-matter of this suit, as your orator is advised and believes, is peculiarly within the jurisdiction of your honor's court of equity.

Wherefore your orator prays that your honor will take this its bill of complaint into consideration, take and receive the proofs respecting the truth of the allegations herein, and that a decree of this honorable court be made adjudging and decreeing that said agreement in writing, executed between your orator and the defendant on the 31st day of December, 1894, be rescinded and cancelled and declared to be of no effect, null and void.

2. That an equitable lien be declared upon all the properties of the defendant in favor of your orator for the said amounts expended by it in pursuance of said agreement and upon improvements and betterments as aforesaid upon the property of the defendant, and for such damages as may seem just, meet and proper to this court, after a reference to a master has been made to determine the amount of such damage.

3. That a reference be had to a master to determine the amount that may be declared as a lien in your orator's favor on all the properties of the defendant.

4. That said lien be declared as aforesaid in favor of your orator, subject, however, to the said prior-lien judgment creditors' claims and demands as may be entitled to take precedence over your orator's demand.

5. That all the properties of the defendant be sold to satisfy your orator's demand as aforesaid and the proceeds thereof be applied—
first, to the payment of the costs and expenses of said refer-
27 ence and sale and the costs and expens-s of your honor's court; s-cond, that the remainder thereof be applied to the payment and satisfaction of the demands of such persons or parties whose claims may by decree of this court be entitled to take priority and precedence over your orator's demand, then to the satisfaction and discharge of your orator's claim against the defendant as set forth in this bill, together with interest from the date of the expenditures of said amounts of money by your orator in pursuance of said contract and on betterments and improvements as aforesaid.

6. That the said Highland Avenue and Belt Railroad Company be made a party defendant to this bill of complaint; that this court will grant unto your orator a writ of subpœna to be issued out of

and under the seal of this honorable court, directed to said Highland Avenue and Belt Railroad Company, commanding it to appear, plead, answer or demur to this bill of complaint within in the time and manner as required by law, and that said defendant be required to stand to, abide and perform such other and further orders and decrees herein as to this honorable court may seem meet and proper.

7. That the court will fully administer as a trust fund all and singular the property, rights and franchises belonging to said defendant, including said lines of Belt railroad and dummy line, with all and singular its appurtenances so held by it as aforesaid and will marshal all assets and ascertain the several respective liens and priorities existing thereon and enforce and decree the rights, liens and equities of each and all the stockholders and creditors thereof as the same may be finally ascertained and decreed by the court upon the respective interventions or applications of each and every creditor or stockholder.

8. That for the purpose of enforcing the rights and equities of your orator and other creditors of said defendant, as well as of protecting the rights, interests and propo-ties of said defendant, and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since the organ-
28 ization of said Highland Avenue and Belt Railroad Company, and of preventing disruption thereof by separate executions, attachments or sequestrations, this court forthwith appoint a receiver of all and singular the property, rights, assets and franchises of every nature and wherever situated, held, owned or controlled by said defendant, together with all rights and contracts, with full authority to manage and operate the same under the direction of the court; and that all of the officers, managers, superintendents, agents and employés of the said defendant be required forthwith to deliver up to such receiver the possession of all and singular each and every part of the said property wherever situated; and also all books of accounts, vouchers and papers in every way relating to its business or the operation of its said railway; and for an injunction restraining each and every one of the officers, directors, managers, superintendents, agents and employés of the said defendant from in any way interfering with the possession and control of such receiver over such property. And your orator prays for such other or further relief as to the court may seem meet and proper and as may be necessary to fully protect and enforce the rights and equities of your orator and of all other creditors and stockholders of said defendant.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN,
Solicitors for the Complainant, The Columbian Equipment Co.

NOTE.—The defendant is required to answer the allegations of the foregoing bill of complaint from paragraphs one to nineteen, both

inclusive, but not under oath, as answer under oath is hereby expressly waived.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN.

29 On June 1, 1896, there was also filed a petition for the appointment of a receiver, and on that day the circuit court, presided over by Honorable John Bruce, district judge, entered an order appointing H. L. Underwood receiver, as prayed for, and issuing an injunction against the Highland Avenue and Belt Railroad Company and its officers, directors, and agents and employés forbidding them from in any way interfering with the possession or management of the receiver. On June 5th an answer was filed to the bill. On the 13th of June, 1896, on proper authority, the bill was amended, and on the 13th of June an answer was filed to the amended bill.

A motion having been made to dissolve the injunction and to discharge the receiver, at the instance of Honorable John Bruce, district judge, it was fixed for hearing before the Honorable
30 D. A. Pardee, circuit judge, and, after due hearing, the said motion was granted and a decree was accordingly entered discharging the receiver and dissolving the injunction. Subsequently, on June 6, 1897, the Honorable John Bruce, district judge, sitting as circuit judge, granted leave to amend the bill, and an amended bill was thereafter duly filed. On the 6th of March, 1897, the following petition for the appointment of a receiver was filed by the complainant:

31 *Petition of Complainant for Receiver.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY
vs.
HIGHLAND AVENUE AND BELT RAILROAD COMPANY. } In Equity. No. 82.

Your petitioner, The Columbian Equipment Company, respectfully makes this its application and shows unto your honor:

1. That on the 1st day of June, 1896, it filed its bill of complaint against the defendant herein, wherein it prayed for an injunction and the appointment of a receiver of all the Highland Avenue and Belt Railroad Company's property, which said bill your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

2. That on the 1st day of June, 1896, Henry L. Underwood, a resident citizen of Birmingham, Ala., was by the Hon. John Bruce, judge, etc., appointed receiver of defendant's property, but subsequently upon a motion filed by the defendant to vacate the order appointing a receiver (which said motion at the request of the Hon.

John Bruce was heard by the Honorable Don A. Pardee at New Orleans, La.), the order appointing said Underwood receiver of the properties of the defendant and the injunction in connection therewith was set aside and avoided.

Your petitioner represents and shows unto your honor that according to the terms of said decree of the Hon. Don A. Pardee vacating said order appointing said receiver, etc., a copy of which decree is hereto attached marked Exhibit A, the said receiver was required to turn over and deliver to the parties or party from whose possession he took the same all the property of every kind and description of the Highland Avenue and Belt Railroad Company which came into his hands as such receiver; that said Underwood received the properties of the defendant from your petitioner and in pursuance of said decree turned over and delivered the same into the possession of your petitioner.

32 Your petitioner further states that after said receiver had delivered into its possession said properties the said Highland Avenue and Belt Railroad Company, without due process of law, wrongfully took possession of said properties at that time under the control of your petitioner without your petitioner's consent and over its protest.

Your petitioner now charges and states that in contemplation of law the possession of said properties rest still in your petitioner; that at the time of the filing of said bill of complaint said properties were in its possession as stated in said bill, and that your petitioner is now, according to said decree and under the law, entitled to the possession of the same.

3. Your petitioner further shows unto your honor that on the 5th day of March, 1897, it filed in said cause an amendment to said original bill, which said amendment your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

4. Your petitioner further states unto your honor that the defendant is heavily involved in debt; that it is not able to pay the judgments that are of record against it, as more fully stated in said bill of complaint, amounting, to wit: to sixty-odd thousand dollars. That it is not able to pay its current expenses and fixed charges as set forth in said amendment to said bill, filed March 5, 1897, and your petitioner charges and states it to be a fact that the defendant is insolvent.

5. That your petitioner has been notified that the judgment creditors of the defendant will make application for the appointment of a receiver of its properties for the purpose of having the same sold for the satisfaction of their demands.

6. That your petitioner is advised by counsel, and therefore states, that on the facts alleged in said bill of complaint and its amendment of March 5, 1897, it is entitled under the law to retain possession of the properties of the defendant until its demand is satisfied by the defendant, or until the same is satisfied from the proceeds of a sale to be declared and ordered by some court having jurisdiction

of such matters in your petitioner's favor and such other creditors as may see fit to join in said bill.

But your petitioner states that under the circumstances of
33 this case it prefers to have an officer of your honor's court to become the custodian of defendant's properties until the legality of your petitioner's demand is established by decree of this honorable court, and so that said properties may be conserved pending the enforcement of the rights and equities of your petitioner and other creditors of said defendant, as well as protecting the rights, interests and properties of the defendant and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier, as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since its organization and of preventing disruption thereof by separate executions, attachments or sequestrations.

7. That to serve such ends as stated in the sixth paragraph of this petition the necessity exists for the appointment of a receiver forthwith to preserve the value of said property and to collect rents and profits that may accrue from the operation of said properties and railroads for application on your petitioner's debt and the other debts of the company; and that unless a receiver is appointed of the defendant's property the value thereof will become impaired and said indebtedness thereby rendered of uncertain or impossible collection.

Wherefore your petitioner prays that a receiver may be appointed forthwith to take charge of such properties under a decree of your honor's court.

Your petitioner suggests as in every way a competent and suitable person to be appointed such receiver Phillip Campbell, formerly the general manager of the Birmingham, Sheffield and Tennessee Valley railroad, lately the general manager of said railroad under the receiver thereof, Edmund A. Hopkins, heretofore appointed under an order of this honorable court, and now a resident of this district and a citizen residing at Sheffield, Ala.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN,
Solicitors for Complainant.

34 And on this petition and the bill and amendments and on motion thereto of the complainant the following order was entered appointing Phillip Campbell receiver:

35 *Order Appointing Receiver Phillip Campbell.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY
vs.
HIGHLAND AVENUE AND BELT RAILROAD COMPANY *et al.* } In Equity.

Upon reading and considering the verified bill in this cause, together with the amendment thereto and the petition of the Colum-

bian Equipment Company, filed on the 6th day of March, 1897, at this term of the court, for the appointment of a receiver, on the motion of counsel for said petitioner, it is ordered by the court that the prayer of the petition be granted and that Phillip Campbell, a citizen of Sheffield, Alabama, be and is hereby appointed receiver of this court of all and singular the property, assets, rights and franchises of the Highland Avenue and Belt Railroad Company, doing business in the city of Birmingham, Alabama, described in the bill of complaint herein, wherever situated, and including all railway tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by the said company, together with all property in connection therewith, and all monies, choses in action, credits, bonds, stocks, leasehole interests, operating contracts and other assets of every kind and all other property, real, personal and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and direction of the court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

And the said Highland — and Belt Railroad Company and each and every of its officers, directors, agents and employés are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

36 Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employees as may be required for the proper discharge of the duties of his trust.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said company.

Said receiver is hereby required to give bond in the sum of

$10,000, with personal security, or the security of some responsible guaranty and indemnity company, satisfactory to the clerk of this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

And the court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims and in all respects to regulate and control the conduct of said receiver.

JOHN BRUCE, *Judge.*

April 5, 1897.

Endorsed: Filed in open court this April 5, 1897. N. W. Trimble, clerk.

37 From this order appointing the receiver the defendant took an appeal, which was allowed, as shown by the petition and accompanying order:

Petition for Appeal.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant, *v.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Defendant.	In Equity.	No. 82.

To the honorable the judges of the circuit court of the United States for the southern division of the northern district of Alabama:

The petition of The Highland Avenue and Belt Railroad Company, a body corporate under the laws of the State of Alabama, the defendant in the above-entitled cause, respectfully shows unto your honors that it is advised by counsel and believes, and therefore states that by the decree rendered by this honorable court on the 5th day of April, 1897, there is manifest error to the prejudice of your petitioner, for the correction of which your petitioner desires to appeal to the circuit court of appeals for the fifth judicial circuit of the United States, and your petitioner files herewith the assignments of error on said appeal.

Wherefore and in consideration of the premises your petitioner prays that it may be allowed to appeal from said decree rendered by this honorable court on the 5th day of April, 1897, to the said court of appeals.

38 And your petitioner further prays that the amount of its appeal bond may be fixed by your honors.

And, as in duty bound, your petitioner will ever pray.

ALEX. T. LONDON,
Solicitor for Petitioner.

Endorsed: Filed April 12th, A. D. 1897. N. W. Trimble, clerk.

39 *Order Allowing Appeal.*

COLUMBIAN EQUIPMENT COMPANY, Complainant, *v.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Defendant. } In Equity. No. 82.

The Highland Avenue and Belt Railroad Company, the defendant in the above-entitled cause, having this day presented and filed in open court its petition praying an appeal to the circuit court of appeals for the fifth judicial circuit from the decree rendered on the 5th day of April, 1897, together with an assignment of the errors relied on on such appeal, as required by law, and praying that the amount of the bond for said appeal may be fixed—

It is therefore ordered, adjudged, and decreed that the said petition be granted and the said appeal be allowed, as prayed in said petition. It is further ordered and decreed that the amount of the bond for such appeal without a supersedeas be, and the same is hereby, fixed at the sum of five hundred dollars.

ALECK BOARMAN, *Judge.*

April 12th, 1897.

Endorsed: Filed April 12th, A. D. 1897. N. W. Trimble, clerk.

40 On the appeal thus taken the assignments of error were as follows:

Assignment of Errors.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant, *vs.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY *et al.*, Defendant-. } In Equity. No. 82.

Now comes The Highland Avenue and Belt Railroad Company, the defendant in the above-entitled cause, and files herewith its petition for an appeal from the decree rendered by the circuit court of the United States for the southern division of the northern district of Alabama, in the above-stated cause, on the 5th day of April, 1897, and says that in the record and proceedings in the said cause there is manifest error in this, to wit:

1. That the court erred in holding that it had jurisdiction to grant the injunction as prayed.

2. The court erred in entertaining jurisdiction of a suit in equity to subject property of the defendant corporation, in advance of the recovery of judgment at law, to the payment of a simple contract,

when said debt is not secured by a lien or mortgage, because under the Constitution the defendant company is entitled to a trial by jury.

3. The court erred in granting an injunction to a simple contract creditor, without a lien or mortgage, and thereby, prior to judgment, interfering with the possession of the property of this defendant, and requiring this defendant to surrender possession of its property to the receiver named.

4. The court erred in granting the mandatory injunction requiring the defendant corporation to deliver all of its property and assets to the receiver named.

5. The court erred in granting the decree which in effect restrains this defendant, its officers and agents, from in anywise interfering with or controlling its property.

6. The court erred in granting said injunction on the facts presented on the hearing.

ALEX. T. LONDON,
Solicitor for Appellant.

Endorsed: Filed April 12th, 1897. N. W. Trimble, clerk.

41 On this appeal the cause came on for hearing, when a motion was duly made to dismiss the appeal on the ground that the circuit court of appeals for the fifth circuit was without jurisdiction to entertain the appeal, because the order appealed from did not grant an injunction or was not equivalent to an order granting an injunction, and that the decree appointing a receiver, being interlocutory and not final, was not susceptible of being appealed from.

The question upon which instructions are desired and respectfully asked is, Was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction or the necessary equivalent of an injunction?

June 16, 1897.

42 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full and perfect transcript of the certificate to the Supreme Court made by said circuit court of appeals in the cause of—

HIGHLAND AVENUE AND BELT RAILROAD COMPANY
vs.
COLUMBIAN EQUIPMENT COMPANY. } No. 595.

as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of July, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,640. U. S. circuit court of appeals, 5th circuit. Term No., 427. The Highland Avenue & Belt Railroad Company, appellant, *vs.* Columbian Equipment Company. Certificate. Filed July 29, 1897.